THE KA WAH BANK LTD

v.

NADINUSA SDN BHD & ANOR

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
PEH SWEE CHIN FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-726-93]
12 MARCH 1998

CONTRACT: *Formation - Offer and acceptance - Contract through correspondence - True construction of whole correspondence - Whether offer substantially accepted in terms*

CONTRACT: *Agency - Solicitor - Acceptance of offer by solicitor whilst client abroad - Actual or ostensible authority - Whether consent of client necessary - Whether matter within ordinary authority of solicitor - Whether client bound by compromise accepted by solicitor*

The appellant ('the bank') had granted some banking facilities to the respondents. The respondents defaulted in repaying various sums of money owed to the bank under these facilities and the bank instituted the following proceedings against the respondents: (a) a claim against the 2nd respondent for the repayment of a loan from the bank to him together with interests ('the first suit'); (b) a claim against the 2nd respondent as a guarantor for the 1st respondent for various facilities granted by the bank to the 1st respondent ('the second suit'); and (c) a declaration against the 1st respondent, Malayan United Bank Bhd and Malayan United Finance Bhd in respect of certain shares in Supreme Finance Bhd ('the third suit').

The respondents, by their solicitors M/s Sri Ram, Zulkifli and Kumar ('Sri Ram & Co') then commenced an action against the bank claiming, *inter alia*, that the first, second and third suits had been settled. In respect of the first suit, it was averred that the settlement had been effected by an exchange of correspondence passing between their solicitors, Sri Ram & Co, one John Gomez from M/s John Gomez & Associates ('JGA') and a duly authorised agent of the bank ('BK Lim'). It was further averred that the second and third suits had also been compromised and a settlement thereof effected between the respondents and the bank by an exchange of another set of letters passing through their respective solicitors and the bank. The respondent sought specific performance of the terms of the said settlements.

The learned trial judge gave judgment against the bank and granted the orders sought by the respondents; hence the instant appeal.

The two issues before the court were: firstly, whether the first, second and third suits had been settled and compromised on the basis of the series of letters exchanged between the parties; and secondly, the question of an apparent or ostensible authority of an agent.

Held:
Per Mohamed Dzaiddin FCJ

[1] The proper approach is to consider the whole correspondence to see whether upon its true construction there is to be found in it an offer substantially accepted in terms which constitutes a contract.

[2] The learned judge had adopted the correct approach by considering the eight letters pleaded in the statement of claim in arriving at his conclusion that an agreement to compromise the first suit was concluded on the basis of a letter dated 4 May 1988 from the bank to JGA ('P5') and its acceptance *via* a letter dated 10 May 1988 from Sri Ram & Co to JGA ('P9'). P5, which contained terms of settlement, constituted a definite offer, and P9 an acceptance of the said offer to compromise the first suit.

[3] In respect of the second and third suits, the letter dated 10 May 1988 from JGA to the bank ('P11') was not a letter of offer to the respondent made by JGA on behalf of the bank. Reading P11 together with P13 (ie, the reply from the bank to JGA after its receipt of P11) and taken as a whole, P11 was nothing more than a preliminary communication between JGA and the bank confirming the earlier discussion between JGA and BK Lim of the bank regarding the possible settlement of the two suits involving the Supreme Finance Bhd shares.

[4] In any event, the letter dated 20 May 1988 from Sri Ram & Co to JGA ('P15') could not in law constitute an acceptance. In the light of the conditions put forward by Sri Ram & Co in P15, which terms were not in P11, P15 did not constitute a final acceptance of the bank's terms of the offer, but an attempt by the offeree to vary the original offer in P11 to include new terms. In the circumstances, there was no concluded contract.

[5] Solicitors have the authority to accept an offer on behalf of their clients who are abroad. Authorities have established that the consent of the client is not needed for a matter which is within the ordinary authority of a counsel, and, if a compromise is entered into by the counsel, in the absence of the client, the client is bound.

[Appeal in respect of first suit dismissed; appeal in respect of second and third suits allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu ('bank tersebut') telah memberikan kemudahan-kemudahan perbankan kepada responden-responden. Responden-responden telah mengingkari pembayaran balik beberapa jumlah wang yang terhutang kepada bank tersebut di bawah kemudahan-kemudahan ini dan bank tersebut telah memulakan prosiding-prosiding terhadap responden-responden: a) Satu tuntutan terhadap responden ke-2 untuk pembayaran balik pinjaman daripada bank tersebut kepada beliau berserta faedah ('guaman pertama tersebut'); b) Satu tuntutan terhadap responden ke-2 sebagai penggerenti bagi pihak responden pertama bagi pelbagai kemudahan-kemudahan yang telah diberikan oleh bank tersebut kepada responden pertama ('guaman kedua tersebut'); dan c) Satu pengisytiharan telah dipohon oleh bank tersebut terhadap responden pertama, Malayan United Bank Berhad dan Malayan United Finance Bhd berhubung saham-saham tertentu dalam Supreme Finanace Bhd ('guaman ketiga tersebut').

Responden, melalui peguamcara mereka Tetuan Sri Ram, Zulkifli dam Kumar ('Sri Ram & Co.') kemudiannya telah memulakan tindakan terhadap bank menuntut, antara lainnya, bahawa guaman-guaman pertama, kedua dan ketiga telah diselesaikan. Berhubung guaman pertama, telah ditegaskan oleh responden-responden bahawa penyelesaian tersebut telah dikuatkuasakan melalui satu perutusan surat antara peguamcara mereka, Sri Ram & Co., seorang yang bernama John Gomez daripada Tetuan John Gomez & Associates ('JGA') dan ejen yang telah diberikuasa oleh bank (Encik B.K. Lim). Adalah seterusnya ditegaskan bahawa guaman-guaman kedua dan ketiga telah juga mencapai kata sepakat dan suatu penyelesaian terhadapnya telah dikuatkuasakan antara mereka di satu bahagian dan bank di pihak yang lain melalui perutusan satu set lagi surat-surat yang dikirimkan melalui peguamcara mereka masing-masingnya dan bank tersebut. Responden memohon untuk mendapatkan perlaksanaan spesifik akan terma-terma penyelesaian tersebut.

Hakim yang bijaksana telah memberikan penghakiman terhadap bank tersebut dan telah memberikan perintah-perintah yang dipohon oleh responden-responden, yang mana telah mengakibatkan rayuan semasa ini.

Kedua-dua isu yang terdapat di hadapan mahkamah adalah pertamanya, samada guaman-guaman pertama, kedua dan ketiga tersebut telah diselesaikan dan dicapai kata sepakat atas dasar siri perutusan surat antara pihak-pihak tersebut; dan keduanya, atas persoalan kuasa zahir atau ketara ejen.

Diputuskan:
Oleh Mohamed Dzaiddin HMP

[1] Pendekatan yang wajar ialah untuk mempertimbangkan keseluruhan persuratan untuk melihat samada di atas pembentukannya yang sesungguhnya, wujud di dalamnya satu tawaran yang secara substansialnya diterima menurut terma-terma yang membentuk satu kontrak.

[2] Hakim yang bijaksana telah menerima pakai pendekatan yang betul dengan mempertimbangkan kelapan-lapan surat yang diplidkan dalam pernyataan tuntutan dalam mencapai kesimpulannya bahawa sesuatu perjanjian untuk mencapai kata sepakat Guaman Pertama tersebut telah dimuktamadkan atas dasar sepucuk surat bertarikh 4 Mei 1988 daripada bank tersebut kepada JGA ('P5') dan penerimaannya melalui surat bertarikh 10 Mei 1988 daripada Sri Ram & Co kepada JGA ('P9'). P5, yang mengandungi terma-terma penyelesaian, membentuk suatu tawaran yang pasti dan P9 pula merupakan suatu penerimaan akan tawaran tersebut bagi mencapai kata sepakat guaman pertama tersebut.

[3] Berhubung guaman-guaman kedua dan ketiga, surat bertarikh 10 Mei 1988 daripada JGA kepada bank tersebut ('P11') bukannya merupakan surat tawaran kepada responden yang telah dibuat oleh JGA bagi pihak bank tersebut. Dengan membaca P11 bersama-sama dengan P13 (iaitu jawapan daripada bank tersebut kepada JGA selepas mereka menerima P11) dan dianggap secara keseluruhannya, P11 tidak lebih daripada suatu komunikasi awal antara JGA dan bank tersebut yang mengesahkan perundingan lebih awal antara JGA dan B.K. Lim bagi pihak bank tersebut berhubung dengan kemungkinan penyelesaian kedua-dua guaman tersebut yang melibatkan saham-saham Supreme Finance.

[4] Dalam sebarang keadaan, surat bertarikh 20 Mei 1988 daripada Sri Ram & Co kepada JGA ('P15') tidak boleh menurut undang-undang membentuk suatu penerimaan. Memandangkan syarat-syarat yang dikemukakan oleh Sri Ram & Co. dalam P15, yang mana terma-terma tersebut tidak terdapat dalam P11, P15 tidak membentuk satu penerimaan muktamad akan terma-terma penerimaan bank tersebut, tetapi merupakan satu percubaan oleh pihak menawar untuk mengubah tawaran asal dalam P11 untuk memasukkan terma-terma baru. Dalam keadaan yang sedemikian, tidak terdapat kontrak yang diputuskan.

[5] Peguamcara-peguamcara mempunyai kuasa untuk menerima satu tawaran bagi pihak anak guaman mereka yang berada di luar negeri. Autoriti-autoriti telah menetapkan bahawa persetujuan anakguaman tidak diperlukan bagi sesuatu perkara yang berada di dalam kuasa biasa seseorang peguam, dan, jika kata sepakat telah dicapai oleh peguam, dalam ketiadaan anakguaman tersebut, maka anakguaman itu adalah terikat.

[Perintah sehubungannya.]

Cases referred to:
Gibson v. Manchester CC [1979] 1 WLR 294 ***(refd)***
Mathews v. Munster [1887] 20 QBD 141 ***(refd)***
Yap Chee Meng v. Ajinomoto (M) Bhd [1978] 2 MLJ 249 ***(refd)***

Other sources referred to:
Chitty on Contracts, 1989, 26th edn, vol I, para 54, p 44
The Law of Contract, Treitel, 1995, 9th edn, p 8

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D4-22-224-88]

For the appellant - Ira Biswas; M/s Chooi & Co
For the respondents - Manjit Singh (F Bodipalar with him); M/s Sri Ram & Co

Reported by Ling Hea Hoon

JUDGMENT

Mohamed Dzaiddin FCJ:

The appellant (the bank) is a limited company incorporated in Hong Kong and carrying on banking business at its branch at 232 Des Voeux Road, Central, Hong Kong. The 1st respondent (Nadinusa) is a private limited company incorporated under the Companies Act 1965 whilst the 2nd respondent (Hashbudin) was at all material times, a director and shareholder of Nadinusa. The respondents were customers of the bank and had been granted banking facilities. Sometime in 1986, the respondents defaulted in repaying various sums of money owed to the bank under these facilities. The bank then commenced the following proceedings against them:

a) In Kuala Lumpur High Court Civil Suit No. 3447 of 1986 (the **First Suit**) the Bank's claim against Hashbudin was for the sum of RM7,870,849.19 together with interest thereon at the rate of RM3,722.28 per day from 1 September 1986 until judgment and interest on the judgment debt at the rate of 8% per annum from the date of judgment to the date of realisation and costs. Hashbudin, in his defence, admitted taking the loan but pleaded that the purpose of the said loan was to purchase 1,300,000 shares in

Worldwide Holdings Berhad ("Worldwide"). In his counterclaim, Hashbudin asked for an order, *inter alia,* directing the Bank to deliver up to him the share certificates in respect of the 1,300,000 shares of Worldwide. On 7th and 8th January 1988 the Bank caused to be issued stop notices in respect of the 1,300,000 shares.

b) In Kuala Lumpur High Court Civil Suit No. 84 of 1987 (the **Second Suit**) Hashbudin was sued as a guarantor for Nadinusa for various sums of money in respect of past due bills, outstanding overdraft facility and in respect of outstanding sum under a standby letter of credit and interest. On 26 November 1987, summary judgment was entered against Hashbudin by the court. Hashbudin had appealed to the judge in chambers.

c) In Kuala Lumpur High Court Originating Summons No. 369 of 1986 (the **Third Suit**) the Bank sought declarations against Nadinusa, Malayan United Bank Berhad and Malayan United Finance Berhad (SF shares) and its nominees that the shares in the Supreme Finance Berhad were pledged by Nadinusa; that the 4,050,000 SF shares were pledged by Supreme Corporation Berhad; and that SF shares registered in MUI's nominee were held on behalf of the Bank.

In addition, there were two other actions which arose from the above suits. In Kuala Lumpur High Court Originating Summons No. 4290 of 1986 Malayan United Bank Bhd. (MUI Bank) became the plaintiff, and Nadinusa and the bank the 1st and 2nd defendant respectively and in Kuala Lumpur High Court Bankruptcy No. D2-43-2872-88, the bank filed a bankruptcy action against Hashbudin.

Pleadings

In the instant case, the respondents, being the plaintiffs in the court below, by their solicitors Messrs. Sri Ram, Zulkifli and Kumar (for short Sri Ram & Co.) commenced an action against the bank on 4 November 1988 claiming, *inter alia,* that the **First, Second** and **Third Suits** had been settled. By para. 9(b) of the statement of claim, they averred that the **First Suit** had been compromised and a settlement in respect thereof had been effected by an exchange of correspondence passing between their solicitors, Sri Ram & Co., John Gomez & Associates, and a duly authorised agent of the bank. The letters relied on by Hashbudin are dated 29 April, 3 May, 4 May, 9 May and 10 May 1988 marked as P3, P4, P5, P6 and P7 respectively. We shall refer to these letters in more detail shortly. By para. 9(c), it was contended that these letters taken together and read as a whole constituted a binding agreement between Hashbudin and the bank compromising the **First Suit** upon the terms that in full and final settlement of Hashbudin's personal account with the bank, Hashbudin would deliver to the bank the Worldwide shares together with blank

transfer forms duly executed. He would also deliver to the bank duly executed resignation letters of all the directors and secretary of Worldwide together with an undated resolution appointing new directors and a secretary. Hashbudin would then refrain from filing any injunction restraining the transfer of the Worldwide shares and the bank would discontinue the **First Suit**.

Further, by para. 10 of the statement of claim, the plaintiffs averred that the **Second** and **Third Suits** had also been compromised and a settlement thereof had been effected between them on the one hand and the bank on the other by an exchange of another set of letters passing through their respective solicitors. These letters had been identified and marked as P11, P12, P15, P16, P17 and P29. The plaintiffs contended that the said correspondence taken together and read as a whole (together with the set of letters referred to in para. 9(b) hereof) constituted a binding agreement between the parties compromising the **Second** and **Third Suits**. Lastly, by para. 14, they averred that the bank was estopped from denying that the **Second** and **Third Suits** had been compromised.

In the defence, the bank denied that the compromise of the **First Suit** was based on the letters set out in para. 9(b) of the statement of claim. By para. 8 of the defence, it averred that the compromise was reached on the basis of two letters exchanged between the bank's solicitors, Messrs. Chooi & Co. and Hashbudin's solicitors, Sri Ram & Co., whereby it was agreed that in full and final settlement of Hashbudin's personal account with the bank, Hashbudin was required to deliver to the bank's solicitors duly executed, valid and registrable transfer forms in respect of 175 x 1000 shares of Worldwide; and Hashbudin's unconditional and irrevocable undertaking that he would not, after the delivery of the transfers, file any action to restrain the sale of the said shares. The bank claimed that Hashbudin failed to perform his obligations of the terms of the settlement as per para. 8 of the defence.

The bank also denied para. 10(a), (b) and (c) of the statement of claim and averred that no compromise or settlement had been effected between the bank and the respondents based on the letters in 10(b) in respect of the **Second** and **Third Suits.**

With respect to the **First Suit**, it may be recalled from the evidence that John Gomez was the solicitor for Kaziz Sdn. Bhd. who was interested to buy the 1.3 million Worldwide shares from the Bank. On receipt of his client's instruction, John Gomez spoke on the phone with Mr. B.K Lim of the bank, allegedly the bank's authorised agent, regarding the settlement of Hashbudin's loan account of RM7 million. On 29 April 1988, John Gomez then spoke to Mr. V. Kumar of Sri Ram & Co., solicitors for Hashbudin about the proposed terms which they agreed. On 3 May 1988 John Gomez & Associates, wrote

to the bank, for the attention of Mr. B.K. Lim, informing the latter about the arrangements for settlement of Hashbudin's account.

On **4 May 1988** the bank replied (P5) to John Gomez & Associates:

> We refer to your letter dated 3 May, 1988.
>
> We confirm that we have all the 1.3 million Worldwide shares and all have transfer forms except for 175,000 shares registered in the name of Rothputra Nominees Sdn. Bhd. We confirm that the Bank will accept all 1.3 million shares in Worldwide, together with transfer forms for all 1.3 million shares duly executed in blank, as full and final settlement of Mr. Hashbudin Hashim's personal loan account with the Bank.
>
> We further confirm that the Bank will agree to discontinue the pending action under Kuala Lumpur High Court Civil Suit No. C4-23-3447-86 with parties having no claim against the other and on the basis that each party pays its own costs.
>
> Mr. Hashbudin Hashim and/or his nominees must deliver to our solicitors, Messrs. Chooi & Co. duly executed blank transfer forms for the 175,000 Worldwide shares referred to above.
>
> As part of our settlement, Mr. Hashbudin Hashim and/or his nominees must undertake not to file any court injunction restraining the transfer of all the 1.3 million Worldwide shares.
>
> If the proposed settlement arrangements are acceptable to Mr. Hashbudin's lawyers, please let us know.

By P6, Messrs. John Gomez & Associates forwarded a copy of P5 to Sri Ram & Co. for their client's confirmation of the proposed terms. In the meantime, on 10 May 1988 the bank wrote P7 enquiring whether its proposed terms of settlement were acceptable to Sri Ram & Co. and whether John Gomez & Associates had received further instruction from Kaziz regarding the 1.3 million Worldwide shares. A copy of this letter was extended by John Gomez & Associates to Sri Ram & Co.

On **10 May 1988,** Sri Ram & Co. replied to John Gomez & Associates (P9) as follows:

> We refer to the above matter and your letter dated the 9th May 1988.
>
> We write to confirm that our client is in agreement with the terms set out in The Ka Wah Bank Ltd's letter dated the 4th May 1988.
>
> As our client is presently abroad, we shall revert with the necessary documents soonest possible.

On receipt of the letter, John Gomez & Associates informed the bank by fax to the effect that its terms had been accepted by solicitors for Hashbudin and in the meantime they were proceeding to obtain the relevant documents from the said solicitors and would let the bank have the same in due course.

It is important to remember that the bank's defence was that the compromise in respect of the **First Suit** was concluded on the basis of letters passed between the bank's solicitors, Chooi & Co. and Sri Ram & Co. Before the High Court, it was submitted that on 31 May 1988 Chooi & Co. wrote D24 to Sri Ram & Co. stating that the bank was agreeable to withdraw and discontinue the **First Suit** on the terms and conditions stated therein. On **8 July 1988,** Sri Ram & Co. replied as follows (D37):

> **KL HC CS No: C4-23-3447-86**
>
> Your letter dated the 31st May 1988 bears reference.
>
> We enclose herewith the transfer forms duly executed to be used solely for the following Share Certificate Nos:
>
> 8790 - 8799
>
> 8800 - 8851
>
> 8853 - 8900
>
> 8901 - 8930
>
> 8931 - 8935
>
> 8936 - 8938
>
> 8940 - 8966
>
> Our client is agreeable to giving your clients an unconditional and irrevocable undertaking that he will not after the delivery of the abovementioned transfers, file any action in a competent court to seek an order restraining the sale of the shares and the return to your clients of the same whether in specie or otherwise and that each party shall be responsible for its own legal costs in connection with the action.
>
> Kindly take steps to discontinue the above mentioned action.

Deliberation Of The Learned Judge

His Lordship carefully examined the letters to see whether on their true construction and taken as a whole there was an offer and acceptance giving rise to a concluded agreement. Indeed, with respect to the **First Suit**, his Lordship posed the following question: The question for the court to consider

here was whether these letters constituted an agreement that the **First Suit** had been compromised. And after considering the submissions of counsel, he narrowed the issue by stating that the question was whether the **First Suit** was compromised on the basis of P5 and P9 or D24 and D37. For reasons which we shall discuss shortly, his Lordship concluded that the **First Suit** was settled by an offer in P5 and its acceptance in P9. He found P5 contained a definite offer to conclude an agreement and P9 an acceptance of the said offer.

Turning to the role of Encik John Gomez in the settlement of the **First Suit**, his Lordship agreed with the bank's contention that neither he nor his firm, John Gomez & Associates, acted as agent for the bank. The learned judge, however, found that at all material times John Gomez & Associates were solicitors for Kaziz who was interested in buying the Worldwide shares, and that in his earlier communications on behalf of Kaziz with B.K. Lim of the Bank and V. Kumar of Sri Ram & Co., John Gomez had sounded to them regarding the settlement of the **First Suit** because his client wanted to buy those shares. Subsequently, John Gomez became involved in the negotiations. But, ultimately it was the bank and Sri Ram & Co. who negotiated through John Gomez in concluding the agreement to settle the **First Suit**. His Lordship relied on Sri Ram & Co.'s letter to John Gomez & Associates dated 29 April 1988 (P3) and the bank's letter (P4) as evidence of the negotiations between the parties through John Gomez & Associates.

Regarding B.K. Lim, his Lordship held that he had the authority to negotiate on behalf of the bank. In his view, what B.K. Lim had done in respect of the settlement of the **First Suit** was to confer or discuss the matter with John Gomez with a view of finding a settlement. After the negotiations, the bank wrote P5, which was signed by B.K. Lim and another officer, both being the authorised signatories of the bank.

With regard to the **Second** and **Third Suits** (the Supreme Finance Suits), his Lordship examined the six letters pleaded in para. 10(a) of the statement of claim to determine whether an agreement was concluded in respect of the settlement of the **Second** and **Third Suits.** His Lordship found the following letter, P11, from John Gomez & Associates to the bank dated 10 May 1988 to constitute a definite letter of offer:

The Ka Wah Bank Ltd
232 Des Voeux Road
C, Hong Kong By Facsimile

fao: **Mr BK Lim**

Dear Sirs,

Re: **Nadinusa Sdn Bhd's account with The Ka Wah Bank Ltd**

This is to confirm the telephone conversation between Mr. BK Lim and our Mr Gomez wherein you have instructed us that you are prepared to settle the following civil suits and actions against the parties (except MUI Bank Bhd and its related institutions) therein named:-

(1) Kuala Lumpur High Court
Civil Suit D4-23-84-87
The Ka Wah Bank Ltd v Hashbudin bin Hashim

(2) Kuala Lumpur High Court
Originating Summons No.
C3-31-369-86
The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd and three (3) others

(3) Kuala Lumpur High Court Suit
Kod 31-4290-86
Malayan United Bank Bhd v Nadinusa Sdn Bhd & The Ka Wah Bank Ltd

In lieu of your discontinuing the said actions against the said parties you will accept the Supreme Finance shares which were the subject matter of the dispute between the parties. The parties will thereafter have no claims against each other. You will also cease to call upon or act on any other security that you may have against the parties in the suits or such third parties who may have provided security in respect of the facilities advanced to Nadinusa Sdn Bhd.

Further, we confirm that we shall commence immediate negotiations with Solicitors who are acting for the parties against whom you have institute legal action.

Yours faithfully,

On the following day, John Gomez & Associates wrote to Sri Ram & Co. (P12) and referred to John Gomez's conversation with Kumar. A copy of P11 was enclosed for Sri Ram & Co. to take instructions from their clients. It is important to note here that P12 was not extended to the bank.

The bank replied to John Gomez & Associates on receipt of P11. The letter (P13) reads as follows:

Attn: **Mr John Gomez**

Dear Sirs

Re: Nadinusa Sdn Bhd

We refer to your letter dated 10 May 1988.

Whilst the Bank is desirous to do a global settlement relating to the above account with the parties concerned along the line as recounted therein your letter, it appears that there is some misunderstanding with regard to the instructions that you are now acting for our Bank.

Our Mr B K Lim's understanding was that you are a close friend of the solicitors acting for the concerned parties and if you could care to mention the Bank's wishes to your solicitors' friends.

Be that as it may, if you wish to act for the Bank in negotiating the proposed settlement, please let us know your fees in this deal. We would have to seek approval from higher authority to appoint your firm to act for the Bank.

Yours faithfully

for THE KA WAH BANK LTD

(Sgd):

Authorised Signatures
Special Accounts Section

On 20 May 1988, Sri Ram & Co. despatched the following reply (P15) to John Gomez & Associates:

We refer to your letter dated 11th May, 1988 enclosing a copy of your fax dated 10th May, 1988 to The Ka Wah Bank Limited.

We are instructed by our client to accept the terms set out in your aforesaid fax to The Ka Wah Bank Limited.

In fulfillment of the terms of the settlement herein reached, our clients' obligations shall extend only to arranging and or **causing** the necessary share certificates together with their duly executed transfer forms in escrow in respect of the Supreme Finance Berhad shares in question to be deposited with The Ka Wah Bank Limited and/or their duly authorised nominees or agents.

Upon our client's depositing or causing to be deposited the said share certificates and transfer forms as aforesaid, The Ka Wah Bank Limited undertakes to withdraw the pending actions instituted against Nadinusa Sdn. Bhd. and Encik Hashbudin Hashim, namely, Kuala Lumpur High Court Civil Suit D4-34-84-87, Kuala Lumpur High Court Originating Summons C3-31-369-86 and Kuala Lumpur High Court Originating Summons Kod 31-4290-86 with which each party to bear their own respective costs.

Upon our clients' depositing the said shares and duly executed transfer forms, your client is entitled to retain all benefits accruing to the said shares from the date hereof.

We trust you will find the above in order and we shall be making the necessary arrangements for our clients to fulfil the aforesaid obligations.

On the same date, John Gomez & Associates wrote to the bank as follows (P16):

The Ka Wah Bank Ltd
232 Des Voeux Road
C. Hong Kong

Attention: Mr. B. K. Lim

Dear Sirs

Re: Nadinusa Sdn Bhd's Account with The Ka Wah Bank Ltd

We enclose herewith a copy of letter from Messrs Sri Ram, Zulkifli & Kumar acting for and on behalf of Nadinusa Sdn. Bhd. wherein the said Solicitors have now confirmed the terms of settlement.

We shall be taking steps to finalise the terms of this arrangement.

We would be obliged if you could kindly let us have your letter acknowledging receipt.

A copy of P16 was sent by John Gomez & Associates to Sri Ram & Co. for the latter's information. (P29).

The bank replied by fax on 20 May 1988 (P17) stating:

We will instruct our solicitors Messrs Chooi & Company to write to Messrs Sri Ram, Zulkifli & Kumar to wrap up the proposed settlement relating to the above captioned.

Based on the above mentioned letters and supported by the evidence of John Gomez, his Lordship came to the following conclusions (p. 68):

> In my opinion the letter dated 10 May 1988 was a definite letter of offer. The terms of the offer as contained in the letter were not disputed by the Bank. From the Bank's letter dated 11 May 1988 it was the Bank's desire to settle to Supreme Finance matter "along the line" as stated in the letter dated 10 May 1988. From the Bank's letter and from the evidence of John Gomez it is clear to me that the Bank wanted John Gomez to put the offer to Messrs Sri Ram Zulkifli & Kumar. My conclusion is also supported by the letter written by Messrs John Gomez & Associates to Messrs Chooi & Co. dated 24 August 1988 which ***inter alia*** stated:
>
> ...(d) on or about the 10th day of May 1988, whilst speaking to your client's Mr. B.K. Lim over the phone, your Mr. B.K. Lim had unsolicitedly enquired if the other matters concerning Encik Hashbudin/Nadinusa Sdn. Bhd. could be settled by way of relinquishing in favour of your client the disputed shares in Supreme Finance Bhd. In fact, to the best of our Mr. John Gomez's recollection, the expression used by your client's Mr. B.K. Lim was "can we also resolve the other matters concerning this pain in the area".
>
> (e) it was as a result of this conversation that our letter dated 10th day of May 1988 was written to confirm your client's intentions. In accordance with what had resulted in the previous instance relating to the Worldwide Shares, our Mr. John Gomez communicated these intentions to Messrs Sri Ram Zulkifli & Kumar and from which various letters has passed/ conversations had taken place with the relevant parties.

His Lordship continued (at p. 74):

> It is my finding that when the bank received the acceptance letter dated 20 May 1988 from Messrs. Sri Ram Zulkifli & Kumar, an agreement was concluded in respect of the Supreme Finance matter. The agreement was concluded even though Messrs Chooi & Co. were required by the bank to "wrap up" the settlement and a draft settlement agreement was subsequently prepared.

On Counsel's contention that B.K. Lim had no authority to make the offer in P11, his Lordship found as follows:

> In my opinion, B K Lim and the bank must have obtained the approval of the Government of Hong Kong to settle the Worldwide and Supreme Finance matters otherwise the statement of defence would have stated so. Exhibit D51 contained instructions on authorised signatures in respect of documents such as cheques, bills of exchange.

After looking at exhs. D50 and D51 and the bank's letter dated 11 May 1988 and after considering the other evidence and all the circumstances in this case, I am satisfied that B K Lim had the authority to make the offer through John Gomez. The bank's letter dated 11 May 1988 clearly endorsed what B K Lim did in respect of the Supreme Finance matter.

In the result, on 3 December 1993, the learned judge gave judgment against the bank and made an order on the following terms:

(1) (a) A declaration that the **First Suit** has been compromised between Hashbudin and the bank (the First Compromise).

(b) Specific performance of the agreement in the First Compromise.

(2) (a) A declaration that the **Second** and **Third Suits** have been compromised between Nadinusa and Hashbudin and the bank (the Second Compromise).

(b) Specific performance of the agreement contained in the Second Compromise.

(3) (a) A declaration that the bank is not entitled in law and in fact to execute and/or enforce or act upon the Summary Judgment dated 26 November 1987 obtained by it in the Second Suit.

(b) A permanent injunction against the bank restraining it from executing, enforcing or acting upon the said Summary Judgment in any manner howsoever against Hashbudin.

(4) (a) Damages for breach of contract in lieu of or in addition to specific performance.

(b) Interest thereon at such rate and for such period as this Honourable Court deems just in the circumstances.

(5) Costs.

(6) Liberty to apply.

The Appeal

The bank appealed against the above decision of the trial judge on several grounds. However, before us, the appeal was argued on two principal grounds. The first ground is on the finding of his Lordship that the **First, Second** and **Third Suits** had been settled and compromised on the basis of the series of letters exchanged between the parties. The second ground relates to the question of an apparent or ostensible authority of an agent.

It will be recalled that the learned judge made separate findings concerning the three suits based on different set of correspondence. In view of the above, Cik Ira Biswas, learned counsel for the bank, submitted that the learned judge erred in law and in fact in holding the **First Suit** was settled on the basis of the bank's letter, P5, and Sri Ram & Co.'s reply, P9, when the uncontroverted documentary evidence showed that the suit was concluded on 31 May 1988 upon the terms stated in D24 and confirmed by D37. Her primary argument was that on its true construction, P5, did not contain any specific offer by the bank for the settlement of the **First Suit**. The letter merely expressed an intention on the part of the bank to settle the suit by offering the "proposed" terms of settlement and stating that: "If the proposed settlement arrangements are acceptable to Mr. Hashbudin's lawyers, please let the bank know". Counsel further submitted that P5 was written as a reply and response to John Gomez's letter of 3 May 1988 seeking the bank's view for a settlement of the Worldwide shares. It was her contention that the **First Suit** was in fact settled on the basis of Chooi & Co.'s letter (D24) to Sri Ram & Co. who confirmed the acceptance of the terms of settlement in their letter, D37. In her view, D24 and D37 contained clear and unequivocal terms of settlement especially an unconditional and irrevocable undertaking given by Hashbudin that he would not file any action seeking an order restraining the sale of the shares etc.

As for the **Second** and **Third Suits**, Cik Biswas submitted that the learned judge also erred in his finding that they had been compromised on the basis of the letters marked as P11, P12, P13 and P15 and oral evidence of John Gomez. In the first place, counsel argued that the learned judge was wrong to hold P11 as a "definite letter of offer" when on the face of it, it was merely a letter written by a solicitor (John Gomez) purporting to confirm telephone instructions given by B.K. Lim of the bank to him. At any rate, B.K. Lim had no authority to make any offer on behalf of the bank and John Gomez or his firm never had any authority to act for the bank, where his authority to act was questioned by the bank in P13. Counsel contended that on the true construction of P11, the bank through B.K. Lim, merely requested John Gomez to make known to Sri Ram & Co. of the bank's wishes for a settlement of the two suits along the line contained therein. P11 could not therefore be construed as a definite letter of offer. Secondly, it was submitted that the learned judge was wrong in holding that P15 was an acceptance letter. He should have found that P15 contained new proposal regarding costs and, therefore at best, it amounted to counter-offer. Hence, the learned judge should have come to a conclusion that there was no agreement reached by the parties in respect of the settlement of the **Second** and **Third Suits**. Counsel also submitted that his Lordship erred in law in failing to consider the effect of P17, which stated that the bank would instruct its solicitors, Messrs. Chooi &

Co. to write to Sri Ram & Co. to "wrap up" the proposed settlement. Counsel argued that the emphasis in the letter was not on the expression "wrap up", but the word "proposed" suggesting that no settlement had yet been concluded.

On the second ground, Cik Biswas submitted that his Lordship erred in holding that it was through John Gomez that the bank and Sri Ram & Co. had negotiated and concluded the settlement of the **First Suit,** when he found earlier that John Gomez was at all material times acting as the solicitor for Kaziz and that he was only sounding to B.K. Lim and Sri Ram & Co. the possibility of the settlement of the **First Suit.** Counsel further contended that even if his Lordship was correct in holding that John Gomez & Associates or John Gomez were held out by the bank to have the authority to negotiate and conclude the settlement of the **First Suit,** the learned judge was wrong to hold that such authority to negotiate was similarly conferred on John Gomez in respect of the settlement of the **Second** and **Third Suits.** On the authority of B.K. Lim, counsel submitted that he had no authority to make the offer contained in P11 through John Gomez in view of the expressed provisions of the Management Agreement, D50, and the Authorised Signatories book, D51. She complained that the learned judge had misconstrued these exhibits.

Conclusions

In dealing with the first ground of appeal, the question turns upon the construction and effect of the correspondence exchanged between the parties. In our view, the proper approach is to consider the whole correspondence to see whether upon their true construction there is to be found in them an offer substantially accepted in terms which constitute a contract. In *Gibson v. Manchester CC* [1979] 1 WLR 294, the question before the Law Lords was whether in the correspondence between the parties there could be found a legally enforceable contract for the sale of a dwelling house by the Manchester Corporation to Mr. Gibson. In the Court of Appeal, Lord Denning MR rejected the conventional approach of looking to see whether upon the true construction of the documents relied upon there can be discerned an offer and acceptance. Geoffrey Lane LJ (dissenting), however, adopted the conventional approach. Allowing the appeal, the House of Lords held that upon the true construction of the documents relied upon as constituting contract, there never was an offer by the corporation acceptance of which by the tenant was capable in law of constituting a legally enforceable contract for the sale of the house. At p. 297, Lord Diplock stated:

> My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, is not one of these. I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied upon as constituting the contract sued upon and seeing whether upon their true construction there is to be found in them a contractual offer by the corporation to sell the house to Mr. Gibson and an acceptance of that offer by Mr. Gibson. I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led into error.

The First Suit

We find his Lordship had adopted the correct approach by considering the eight letters pleaded in para. 9(b) of the statement of claim in arriving at his conclusion that an agreement to compromise the **First Suit** was concluded on the basis of P5 and P9 and not based on D24 and D37. He found the bank's letter dated 4 May 1988 (P5) constituted a definite offer and Sri Ram & Co.'s reply of 10 May 1988 (P9) an acceptance of the said offer to compromise the **First Suit** in respect of the Worldwide shares. He gave the following reasons (A.R. Vol. 1A, pp. 53-54):

> I think the bank's letter dated 4 May 1988 contained a definite offer to conclude an agreement. In that letter the bank said that it would accept all the 1.3 million shares in Worldwide together with transfer forms for all 1.3 million shares duly executed in blank. The bank agreed to discontinue the Kuala Lumpur High Court Civil Suit No. C4-23-3447-88. It was also a term of the offer that Hashbudin must deliver to Messrs. Chooi & Co. duly executed blank transfer forms in respect of the 175,000 Worldwide shares. It was also a term of the offer that Hashbudin must undertake not to file any court injunction restraining the transfer of all the 1.3 million Worldwide shares.

His Lordship continued:

> On 10 May 1988 Messrs. Sri Ram, Zulkifli & Kumar wrote to the bank stating that Hashbudin agreed to the terms set out in the bank's letter dated 4 May 1988. From this letter, it is clear to me that Hashbudin agreed to deliver the blank transfer forms in respect of the 175,000 Worldwide shares. He also agreed to undertake not to file any court injunction to restrain the transfer of the 1.3 million shares.

He concluded thuswise:

> Looking at the two letters, the other related letters and the evidence in this case, I am satisfied that it was clearly the intention of the parties to conclude an agreement and it is my finding that an agreement was concluded on 10 May 1988 in respect of the first suit.

Having examined the correspondence exchanged between the parties, we are in complete agreement with the reasons and conclusion of the learned judge that an agreement to compromise the **First Suit** was concluded on the basis of P5 and P9. Firstly, we agree with his Lordship that P5 is a letter of offer containing terms of settlement. Counsel contended before us that P5 was merely a reply to John Gomez & Associates' letter, P4, which sought the bark's view on the proposed settlement of Worldwide shares account. With respect, we do not agree with her contention. In our view, P5 must be read together with and in the light of P3, P4 and P7 and P8. Whilst we agree that P5 was a reply to P4, looking at its content, it could be inferred from the terms mentioned therein that the bank was making an offer to settle the **First Suit** whereby it confirmed that it would agree to discontinue the **First Suit** upon the terms specified therein. An offer is an expression of willingness to contract on specified terms made with the intention that it shall be binding as soon as it is accepted by the offeree (Treitel, *The Law of Contract*, 9th Edn. (1995) p. 8). Thus, the letter stated that firstly, it would accept all the 1.3 million Worldwide shares together with the transfer forms duly executed in blank as full and final settlement of Hashbudin's personal loan account with the bank. Secondly, it would agree to discontinue the **First Suit** with each party having no claim against the other and that each party to bear its own costs. Thirdly, Hashbudin and/or his nominee must deliver to the bank's solicitors, Chooi & Co., duly executed blank transfer forms in respect of the remaining 175,000 Worldwide shares. Fourthly, Hashbuddin and/or his nominee must undertake not to file any injunction restraining the transfer of the 1.3 million Worldwide shares. The letter concluded with a request that the bank be informed if the proposed settlement arrangements were acceptable to Hashbudin's lawyers. Six days later, on 10 May 1988, the bank wrote P7 enquiring from John Gomez & Associates whether the proposed terms of settlement mentioned in P5 were acceptable to Sri Ram & Co. Reading the whole letter together with the other correspondence referred to above, the only conclusion we can arrive, is that, P5 contains an offer to settle the **First Suit** on the terms stated therein.

We also agree with his Lordship that P9 is an acceptance of P5. By P9, Sri Ram & Co. on behalf of their client, accepted the offer and confirmed their agreement to the terms set out in P5. Hence, an agreement to settle the **First Suit** was concluded when Sri Ram & Co. communicated their client's acceptance of the terms of the offer in P5. On P9, his Lordship considered whether the solicitors had the authority to accept the offer on behalf of their client who was abroad. He held that the solicitors had the authority relying on a High Court decision *Yap Chee Meng v. Ajinomoto (M) Bhd.* [1978] 2 MLJ 249, where the case of *Mathews v. Munster* [1887] 20 QBD 141 was referred. There, the English Court of Appeal held that the consent of the client was not needed for a matter which was within the ordinary authority of counsel, and, if a compromise was entered into by counsel, in the absence of the client, the client was bound. We think his Lordship had correctly followed *Mathews*. In short, we agree with his conclusion.

On the role and involvement of John Gomez in the settlement of the **First Suit**, we agree with the primary finding of the learned judge that he was at all material times acting on behalf of Kaziz, negotiating with the bank for the purchase of 1.3 million Worldwide shares. However, based on P3 and P4 his Lordship drew an inference that it was through John Gomez & Associates that the bank and Sri Ram & Co. later negotiated with each other for the settlement of the **First Suit.** From the correspondence and the background facts against which the parties had conducted the negotiations, we agree with his Lordship's conclusion. We hasten to add that on the true construction of the correspondence, we find John Gomez and his firm had no authority to act for the bank.

As for B.K. Lim, we need only advert to P5 which confirmed that this letter of offer duly bore the authorised signatories, who had the authority to sign on behalf of the bank.

In the result, upon the true construction of the correspondence which are highlighted above, we find the learned judge did not err in law or in fact in holding that the **First Suit** had been compromised.

The Second And Third Suits

Turning to the **Second** and **Third Suits,** the question for our decision is whether his Lordship was correct in construing P11 as a definite letter of offer and P15 as an acceptance of the said offer.

We note that the learned judge did not give reasons for his conclusion that P11 contained a definite offer to settle the two suits. He appeared to have accepted oral evidence of John Gomez, who stated that P11 was a letter of offer. See: *ibid* at p. 64. With respect, his Lordship misdirected himself in relying on the oral evidence. Whether or not P11 constitutes a definite offer is a question of construction *(Gibson v. Manchester CC supra)*. His Lordship has to construe P11 and read it together with the correspondence pleaded in para. 10(b) of the statement of claim. On our part, on its true construction, we find P11 is not a letter of offer. In our view P11 was written by John Gomez to the bank for the purpose of confirming an earlier telephone conversation between him and B.K. Lim of the bank concerning the bank's desire to settle the two suits on the terms mentioned therein and for John Gomez to mention this to Hashbudin's solicitors. This inference is supported by the bank's immediate reply, P13, which in the context of P11 made particular reference to John Gomez being a "close friend of the solicitors acting for the concerned parties" and if he "could care to mention the bank's wishes" to his solicitor friend. It is common in the business world that when parties negotiate by way of correspondence with a view to making or concluding a contract, many preliminary communications may pass between them before a definite offer is made. Reading P11 together with P13 and taken as a whole, we view P11 as nothing more than a preliminary communication between John Gomez & Associates and the bank confirming the earlier discussion between John Gomez & Associates and B.K. Lim regarding the possible settlement of the two suits involving the Supreme Finance shares. In the circumstances, with respect to the learned judge, we disagree with his finding that P11 was a definite letter of offer.

We would add that in his evidence, John Gomez admitted that when he wrote P12 to Sri Ram & Co. enclosing a copy of P11, he was not acting for the bank (See p. 130G of the Appeal Record). Also, how could P11 constitute an offer by the bank when it was addressed to the bank? Furthermore, John Gomez's lack of authority is obvious from the last paragraph of the bank's letter dated 11 May 1988 to John Gomez (P13) which we would, in view of its significance, reproduce below, at the risk of being repetitive:

> ... if you wish to act for the bank in negotiating the proposed settlement, please let us know your fees in this deal. We would have to seek approval from higher authority to appoint your firm to act for the bank.

From P13, his Lordship inferred and concluded that the bank had wanted John Gomez to make an offer of settlement to Sri Ram & Co. Again we find this was a wrong inference and conclusion. In our view, P13 is a reply to P11 written with the primary purpose of explaining at the earliest opportunity "some misunderstanding" arising from P11 regarding the instructions that John

Gomez was acting for the bank. In fact, the last paragraph of P13 put beyond dispute that neither John Gomez nor his firm had any authority to act for the bank to negotiate for the settlement of the two suits. The letter further mentioned about the bank being desirous of doing a global settlement of Nadinusa's account "along the line" proposed in P11 and the fact that John Gomez was a close friend of the solicitors acting for Nadinusa, and if the latter could care to mention its wishes to his solicitor friend. In the circumstances, it is wrong to conclude that the bank wanted John Gomez to make an offer on its behalf. On the contrary, in our view, it is a reasonable inference that B.K. Lim was merely requesting John Gomez if he could sound out to V. Kumar of the bank's desire to settle the two suits "along the line" mentioned in P11 and to get the latter's response.

Even assuming we are wrong in holding P11 was not a letter of offer, then, in our opinion, P15 could not in law constitute an acceptance. According to *Chitty on Contracts,* 26th Edn. (1989) Vol. 1, para. 54, p. 44, "an acceptance is a final and unqualified expression of assent to the terms of the offer". But, where the reply is qualified or attempts to vary the terms of the offer or attempts to accept an offer on new terms (not contained in the offer), then such a reply is not a communication of an acceptance but may be a rejection accompanied by a counter-offer which the original offeror can accept or reject (*ibid.* paras. 56, 95, pp. 46, 72). In the light of the conditions put forward by Sri Ram & Co. in P15 that the bank gave an undertaking to withdraw the two suits and that each party to pay their own costs, which terms were not in P11, it is our conclusion that P15 does not constitute a final acceptance of the bank's terms of the offer, but an attempt by the offeree to vary the original offer in P11 to include new terms on undertaking and costs. In the circumstances, there was no concluded contract.

For the above reasons, it is our finding that the learned judge erred in law on his finding that from the evidence and the exhibits, the parties had come to a definite and complete agreement in respect of the settlement of the **Second** and **Third Suits.**

In the light of the above findings and for reasons stated herein, our judgment is as follows:

1. Appeal against the finding of the trial judge in respect of the compromise of the **First Suit** is hereby dismissed. Accordingly, we affirm paras. 1(a), (b), and 4(a) (in relation to the first compromise only) of the Order of the court below as contained in the judgment dated 3 December 1993.

   We find para. 4(b) vague and is hereby set aside.

2. Appeal against the finding of the learned judge in respect of the **Second** and **Third Suits** be allowed. There had been no compromise of these two suits. Therefore, paras. 2(a) and (b), 3(a) and (b) are set aside.

3. Paragraph 5 on costs is set aside. There shall be an order that the costs here and below be taxed, if not agreed; that half of the taxed costs in the court below be paid by the appellant/defendant to the respondents/ plaintiffs; and that half of the taxed costs of this appeal be paid by the respondents to the appellant.

4. Deposit to be refunded to the bank.